OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 08-09 **July 1, 2008**

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Ronald Meisburg, General Counsel

RE: Submission of First Contract Bargaining Cases to the Division of Advice

In GC Memorandum 06-05 dated April 19, 2006 and GC Memorandum 07-08 dated May 29, 2007, I set forth a remedial initiative dealing with first contract bargaining cases intended to ensure that employees have freedom of choice on the issue of union representation, free of coercion by any party, and that their decision in an election is protected by this Agency. In order to ensure consistent analysis and use of appropriate remedies in union organizing and initial contract bargaining cases, both memoranda instructed Regional Offices to submit certain cases, with a Regional Office recommendation, to the Division of Advice.

During the approximately 20-month period in which these two memoranda were in effect, the Division of Advice evaluated nearly 200 first contract initiative cases in which Regional Offices made recommendations concerning the appropriateness of additional remedies and/or Section 10(j) proceedings.[1] Although the number of cases in which the Division of Advice disagreed with the Regional Office recommendations was small, the review enabled further development of this initiative and refinement of the appropriate cases that warrant additional interim and final remedies.

As a result of this review, in first contract cases the Division of Advice authorized seeking Mar-Jac extensions from 6 to 12 months, bargaining schedules, multi-facility posting, union access to bulletin boards, payment of union negotiation expenses (including lost employee wages), and bargaining progress reports to the Region. Of these remedies, specific bargaining schedules were authorized in cases involving refusals to meet at reasonable times. In one case where the employer's contract with the Air Force had only a few months left to run, we sought a bargaining schedule of 12 hours per week in an effort to minimize the possibility that a change-over to a new contractor would occur without a bargaining relationship in place.[2] Similarly, the Division of Advice authorized that a specific bargaining schedule be sought in two cases where the employers engaged in some of the following conduct: repeatedly ignored

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[1] In GC Memorandum 08-08, "Report on First Contract Bargaining Cases," dated May 15, 2008, I reported on our initial experience with this initiative.

[2] The case settled before Board authorization.

union requests to schedule bargaining sessions, cancelled sessions, arrived to sessions late, insisted that the union read its proposals aloud at the table, interrupted sessions with lengthy caucuses, and left sessions early. In one case, the Region was authorized to seek a bargaining schedule of 15 hours per week, including back-to-back sessions, and in another Advice authorized the Region to seek a minimum of two full days of bargaining per month. In both of these cases, we also sought reimbursement of bargaining expenses to the union as part of the Board's order. These unfair labor practices caused each union to expend resources in futile fruitless bargaining and amounted to a complete repudiation of the collective bargaining relationship.

The Division of Advice also authorized seeking the remedy of union access to employer bulletin boards. In one case, the employer made numerous threats of discharges and promises of benefits, and solicited employee signatures on an anti-union petition after the union was certified. The employer then closed and created an alter ego, which discharged all the employees and refused to recognize the union. Union access to bulletin boards was needed to increase the union's ability to communicate with the reinstated and new employees. The Board authorized the same access remedy in the Section 10(j) case.

From these examples and our review of the first contract initiative cases, several analytical principles emerged. First, the same investigative tools and analysis should be applied to Regional determinations concerning the need for additional remedies as to the determination concerning the need for Section 10(j) relief. Second, when the impact of unfair labor practices on the collective bargaining process requires additional remedies, those same impacts normally would warrant Section 10(j) relief as well. For example, if the adverse impact of a chronic refusal to meet is so significant as to warrant a bargaining schedule as part of the Board order, the same impact creates the need for a bargaining schedule now under a Section 10(j) injunction.[3] Finally, in considering the impact of the allegations on collective bargaining and statutory rights, the Regions should consider the well established inferences of harm upon which courts have relied to grant Section 10(j) relief.[4]

In order to assure that the first contract initiative continues to be effective, for a period of six months after the date of this Memorandum, Regions should submit to the Division of Advice, with a copy to the Division of Operations-Management, first contract bargaining cases in which merit has been found involving the following unfair labor practices:

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[3] There may be unusual situations in which certain additional remedies sought in a complaint would not be warranted in a Section 10(j) case, particularly where the additional remedies address certain unfair labor practices not being alleged in the Section 10(j) proceeding.

[4] Examples of situations where these inferences are particularly appropriate, with case citations, are described in GC Memorandum 07-01, "Submission of §10(j) Cases to the Division of Advice," December 15, 2006, pp. 2-3.

- Chronic delay in meeting or outright refusal to meet at reasonable times
- Refusal to provide information needed for bargaining
- Surface bargaining
- Unilateral changes
- Discharge of union leaders/negotiators/key supporters
- Mass discharges
- Discriminatory or otherwise unlawful subcontracting of bargaining unit work that decimate or eliminate the unit itself
- Tainted withdrawal of recognition at the end of the certification year
- Breaches of settlement agreements during initial contract bargaining

Except for the submissions requirements outlined above, other mandatory submissions set out in GC Memorandum 06-05 are no longer required.[5] Regional submissions to the Division of Advice should include a summary of the violations to be alleged, a discussion of the impact of the violations on the bargaining relationship and/or employee support for the union, the Region's recommendation on which, if any, additional remedies are appropriate and why, and the Region's recommendation on whether Section 10(j) relief is appropriate.

If the Region is recommending that additional remedies and Section 10(j) relief be authorized, it should submit the standard 10(j) recommendation memorandum. If the Region is recommending against both 10(j) and additional remedies, it should submit a short memorandum explaining the basis for its recommendation and attach the decisional documents (field investigative report, agenda outline, agenda minute) and the complaint. Recommendations to seek additional remedies should be treated as standard submissions to the Division of Advice, including the parties' positions, if any, on the recommended remedies.

If you have any questions concerning this memorandum, please contact the Division of Advice.

/s/
R.M.

cc: NLRBU
Release to the Public

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[5] As stated in GC Memo 06-05, "test of certification" Section 8(a)(5) cases should not be submitted. Rather, consistent with our Agency goals, they are to be processed as quickly as possible by means of summary proceedings. See OM 04-25, "Test of Certification Bargaining Order Summary Judgment Cases," February 12, 2004. In addition, a Region need not submit merit cases in which the parties agree to a bilateral settlement before complaint issues.